Supreme Court, U.S.
FILED

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(1)

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

ELAINE RUTH ROBINSON-PETITIONER

Vs.

JO ANNE B.BARNHART-RESPONDENT
Commissioner, Social Security administration

ON PETITION FOR A WRIT OF CERTIORARI
TO

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

ELAINE RUTH ROBINSON, PRO SE

SIGNED. Elaine Ruth Robinson DATE. 2-03-03

6540 WEST HIGHLAND AVENUE

PHOENIX , AZ 85033-1615

623-846-4266

43 pp

QUESTIONS

1. How can the ALJ and the Commissioner of the Social Security Administration insist on two (2) onset dates for my suffering of over forty years of Multiple Sclerosis debilitating disease?

2. How can the ALJ in his findings from the hearingclaim I have no listed impairments in appendix 1, Subpart P, Regulation No. 4,. Dealling specifically with Multiple Sclerosis?

3. How could the Disability Examiner from the disability determination service administration determined that I did meet the above criteria from an examination of 7 hours- almost two years before the ALJ refuted this document and proof thereof?

4 Why did the ALJ "accorded no weight" to this vocational assessment and claimed my Multiple sclerosis Physician of 120 Miles would have more relevance-in my being able to work

6. Why would the commisioner agree with the disability examiner and backdate my benefits from accepting the findings of the vocational assesment, and disability examiner but the ALJ still determined I could not be disabled from the second onset date?

7. How could the ALJ state that I could return to my previous employment ?

8. Why would the "legal" system treat me as if I have a curable disease?

LIST OF PARTIES

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(6th Cir. 1981) 3,4,32,33

SOCIAL SECURITY REGULATIONS

20 C.F.R. Subpart P, Appendix 1
(This regulation is paraphrased below and Verbatim in Appendix C)
D. *In conditions which are episodic in character* such as multiple sclerosis...
E. *Multiple sclerosis.* The major criteria for evaluating impairment caused by multiple sclerosis are discussed in listing 11.09. Paragraph A. provides criteria for evaluating...
11.09 *Multiple sclerosis.* With:
A. Disorganization of motor function as described in 11.04B: (or)11.09 B*
11.04
B.Significant and persistent disorganization of Motor function... (See 11.00 C)
11.00
C. Persistent disorganization of motor function...
11.09
*B. Visual or mental impairment as described Under the criteria in 2.02, 2.03, 2.04, or, 12.02: or
C. Significant, reproducible fatigue...
. 29-31

OPINIONS

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT appears at Appendix A to the petition and is unpublished.

The opinion of the UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA Appears at Appendix B to the Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was November 22, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1254(1).

STATEMENT OF THE CASE

I have to answer to the many citations and or cases brought up by the defendant , when there was none referring to someone with my disabling disease. I used Patricia Parrish, *Parish v. Califano,* 642 F. 2d 188 (6th Cir. 1981), we suffer. Well over fifty years ago I was a legal secretary to the office of investigations and audits for the Chicago Board of Trade. How would I tell these attorneys how I was treated? To be compared to a migrant farm worker who did not speak English or Spanish a drunk and substance abuser. I am a citizen of the United States of America, was born in Chicago, Illinois and have always used English as my spoken and written language. I am a female ; I never have smoked and was never drunk nor have a substance abuse.

The defendant never once responded to my queries, but instead made me appear like a person who would rather fabricate stories of myself than to speak the truth. Why does the Defendant insist on changing my onset date for Multiple Sclerosis, when it appears and is documented and already accepted as having the onset date as January , 1963.

Once you are diagnosed as having Multiple Sclerosis, YOU HAVE IT FOR LIFE. THERE IS NO CURE, only remissions and exacerbations I know-I HAVE LIVED WITH IT AND RECEIVED TREATMENTS FOR THE EXACERBATIONS EVER SINCE 1/63. My doctor at that time said that I would just have to tell everyone that I needed help from time to time. My family of three adult children and my husband of 48 years have all helped me The children have all earned their college degrees without any help from their parents. Our oldest is a facial plastics' reconstructive head and neck surgeon.

REASONS FOR GRANTING THE PETITION

In *Parish v. Califiano* F 2d 188-193 (6th Cir. 1981) The Honorable Judge Cornelia Kennedy very clearly ruled on how a claimant such as Patricia Parish could be misdiagnosed and mistreated with the mysteries of the Multiple Sclerosis Syndrome. Judge Kennedy on page 193 elicited how the ALJ erred in that case by not using 20 C.F.R. Subpart P. Appendix 1,11.09A 461 462.

I had hope in the Supreme Court Of the United States it would adjudicate and rule that Multiple Sclerosis is not the same as any other medical disability. You try harder to work even though you will never be able to reach the levels that were apparent prior to the disease.

I suffer from a disease which is consistently inconsistent. We always look so good-but now you know that is just the surface of waxing and waning of this mystery disease.

Please do not let other be treated the way I have been -just because I wanted to work...

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 22 2002
CATHY A CATTERSON
CLERK , U.S.COURT OF
APPEALS

ELAINE RUTH ROBINSON

Plaintiff-Appellant,

V.

JOANNE B. BARNHART, Commissioner,
Social Security Administration,

Defendant, Appellee,

Appeal from the United States District Court
For the District of Arizona
James A. Teilborg, District Judge, Presiding
Submitted November 18, 2002***

Before: REINHARDT, RYMER, AND SILVERMAN, Circuit Judges.

Elaine Ruth Robinson appeals pro se the district court's summary judgment

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* Jo Anne B. Barnhart is substituted for Kenneth S. Apfel as commissioner of Social Security Administration, pursuant to Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App,P. 34(a)(2).

For the Commissioner of Social Security ("Commissioner") on Robinson's claim that the Administrative Law Judge ("ALJ") improperly determined the onset date of her disability as December 1, 1996, and not November 30, 1992. We have jurisdiction under 28 U.S.C. Sec. 1291. We Affirm.

We review de novo the district court order affirming the Commissioner's denial of social security benefits. *Armstrong v. Commissioner of the Soc. Sec. Admin.*, 160 F.3d 587, 589 (9th Cir. 1998). If the Commissioner applied the correct legal standards and substantial evidence supports the Commissioner's decision, it must be affirmed. *Id.*

None of Robinson's examining and treating physicians opined that Robinson's multiple sclerosis was disabling prior to December, 20, 1996. The medical reports and the testimony of the vocational expert constitute substantial evidence supporting the ALJ's conclusion that Robinson was capable of performing her past relevant work as a secretary/clerk until December 1, 1996. *See Villa v. Heckler*, 797 F. 2d 794, 796 (9th Cir. L996) (stating that while the Secretary could have chosen an earlier onset date the question we face is whether the chosen onset date is supported by substantial evidence, not whether an earlier date could have been supported).

The May 1992 report of Robinson's treating physician Dr. Sibley, that Robinson had never been disabled for purposes of full time employment, provided clear and convincing reasons for finding Robinson's testimony not credible. *See Johnson v. Shalala*, 60 F.3d 1428, 1433-34 (9thCir.1955) (finding clear and convincing reasons based on contradictions

between claimant's testimony and the relevant medical evidence). Furthermore, the ALJ properly rejected the opinion of vocational consultant Richard W. Vandenberg because it was based on a one-time evaluation, and conflicted with both Robinson's testimony and Dr. Sibley's reports. *See Magallanes v. Bowen*, 881 F. 2d 747,751 (9th Cir. 1989).

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JUDGMENT IN A CIVIL CASE

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DEC 3 2001
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY JH DEPUTY

Elaine Ruth Robinson,

Plaintiff((s) ,

v.

Commissioner, Social Security Administration,

Defendant (s) ,

CIV 00-2042 PHX-JAT

_____ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration before the Court. The Issues have been considered and a decision has been .rendered.

IT IS ORDERED AND ADJUDGED per the Court's order of December 3, 2001 granting Defendant's motion for summary judgment, this case is closed. Plaintiff to take nothing.

December 3, 2001
Date

RICHARD H. WEARE
District Court
Executive/Clerk
"s/ J hyatt".
(By) Deputy Clerk

Cc: (all counsel)

APPENDIX B

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY_____JH_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Elaine Ruth Robinson	) No.CIV-00-2042-PHX-JAT
	)
Plaintiff,	) **ORDER**
	)
vs.	)
	)
	)
Commissioner, Social	)
Security Administration	)
	)
Defendant.	)
	)
_____	)

Pending before this Court is plaintiff's appeal from a decision of the Commissioner of Social Security establishing the disability onset date for purposes of disability benefits under Title II of the Security Act ("SSA"), 42 U.S.C.(double section) 401-433. Plaintiff has filed a Motion for Summary Judgment (Doc. #21). Defendant has filed a Cross-Motion for Summary Judgment (Doc. #22). After reviewing the submissions on file, the Court has determined that the decision of the Commissioner should be affirmed.

I. Procedural History

In April 1997. Plaintiff filed an application for Social Security disability insurance benefits under Title II, alleging disability due to multiple sclerosis ("MS") and a degenerative disk since November 30, 1992. ("Transcript."79). Upon reviewing plaintiff's application, the Regional Commissioner determined that the medical evidence did not establish Plaintiff's condition until her examination in July 1997. Based on the severity of plaintiff"s condition and the agency's prior experience with like conditions the Commissioner set the onset date of Plaintiff's disability at December 1, 1996. (Tr.60-61). This decision was affirmed on reconsideration. (Tr. 59) On January 8,, 1999, the administrative law judge ("ALJ") held a hearing on plaintiff's application. By decision dated April 29, 1999, the ALJ determined the claimant was not entitled to a disability onset date earlier than December, 1996. (Tr. 22).

Plaintiff requested review of the ALJ's decision by the Appeals Council. By action statement filed August 23, 2000, the Appeals Council denied Plaintiff's request for review. (Tr. 7-8). Having exhausted her administrative review process, Plaintiff appealed the final determination to this Court pursuant to 42 U.S.C.Sec. 405(g).

On August 1, 2001, Plaintiff moved for summary judgment or remand of her claim. (Doc. #21). On September 4, 2001, Defendant filed a Cross-Motion for Summary Judgment. (Doc.#22). Both motions are now before this Court.

II. Standard of Review

The commissioner's decision to deny benefits will

be overturned "only if it is not supported by substantial evidence or is based on legal error." *Magallanes v. Bowen,*881 F.2d 747, 750 (9thCir. 1989). Particularly, when reviewing a determination of a disability onset date, this Court must resolve '"whether the chosen onset date is supported by substantial evidence, not whether an earlier date could have been supported'" *Villa v. Heckler,* 797 F.2d 794, 797(9thCir.1986) (quoting *Swanson v. Secretary of Health & Human Servs.,*763 F.2d 1061, 1065 (9thCir. 1985)). Substantial evidence is more than a mere scintilla, but less than a preponderance. *Reddick v. Charter,* 157 F.3d 715,720 (9th Cir. 1998).It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

In determining whether there is substantial evidence to support a decision, this Court considers the record as a whole, weighing both the evidence that supports the administrative law judge's conclusions and the evidence that detracts from the administrative law judge's conclusions. *Id.* If there is sufficient evidence to support the Commissioner's determination, the Court cannot substitute its own determination. *See Young v. Sullivan.* 911 F.2d 180, 184 (9th Cir. 1990). Additionally, the administrative law judge is responsible for resolving conflicts in medical testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala, 53 F.3d* 1035, 1039 (9th Cir.1995). Thus, if on the whole record before this Court, substantial evidence supports the Commissioner's decision, this Court must affirm it. *See Hammock v. Bowen,* 879 F,2d 498, 501 (9thCir.1989); *see also* 42 U.S.C. Sec. 405(g).

Under the Social Security Act, a "disability" is defined as an "inability to engage in any substantial

gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. Sec. 423 (d)(1)(A). An individual is determined to be under a disability if,"...his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy..." 42 U.S.C. Sec. 423 (d)(2)(A); *Reddick,* 157 F.3d at 721. If the claimant shows that he or she is unable to perform past relevant work, the burden shifts to the Commissioner to show that the claimant "...can perform other substantial gainful work that exists in the national economy." *Reddick,*157 F.3d at 721.

The ALJ determines an applicant's eligibility for benefits by deciding the applicant's status with respect to each of the following:

1. is the applicant currently engaged in "substantial gainful activity";

2. does the applicant have a "medically severe impairment or combination of impairments";

3. does the applicant's impairment equal one of a number of listed impairments that the Commissioner acknowledged as so severe as to preclude the applicant from engaging in substantial gainful activity;

4. if the applicant's impairment does not equal

one of the "listed impairments," is the applicant capable of performing his or her past relevant work;

5. If the applicant is not capable of performing his or her past relevant work, is the applicant able to perform other work in the national economy considering his or her age, education, and work experience.

See Bowen v. Yuckert, 482 U.S. 137, 140-41 (1987) (citing 20 C.F.R. Sec 2 404.1520(b)-(f)). As noted above, in analyzing step five, the burden shifts to the Commissioner.

III. The Commissioner's Findings

Plaintiff was born on August 4, 1934. She was diagnosed with MS in 1963. (Tr. 31). She has a twelfth grade education with prior work experience as a secretary, office clerk, and most recently, as a clerk/ typist. (Tr. 127) Plaintiff worked and earned substantial wages from 1980 through 1992. (Tr. 86). She alleges that her MS became disabling on November 30, 1992, thus qualifying her for Social Security disability benefits for a period commencing on that date. (Tr. 79, 102).

A. Medical Evidence

During the years 1992 through 1996 plainfiff was seen by several physicians for treatment. In January 1992, Dr. M.S. MacCollum, III, M.D., examined plaintiff for back pain. Dr. MacCollum diagnosed Plaintiff as having a mild lubosacral strain, but did not order any change in Plaintiff's work status. (Tr. 164). By February 5, 1992, Plaintiff's strain had improved and Plaintiff had an "excellent range of motion."(Tr. 163). On March 13,1992, Plaintiff sought emergency

treatment because her stomach was "churning." (Tr. 145). Based on Plaintiff's comments, the emergency room physician determined that her condition was the result of stress caused by work-place relations. (Tr. 145). Ten days later on March 23, 1992, Dr. Deborah Villa, M. D., Plaintiff's treating physician, examined Plaintiff and diagnosed plaintiff's stress as "situational". prescribed medication and released Plaintiff to return to work. (Tr.228). Dr. Villa also noted Plaintiff was experiencing elbow pain due to a prior injury. On March 30, 1992, Dr. W.A. Sibley, M.D. a neurologist treating Plaintiff's MS since 1985, examined Plaintiff. Dr. Sibley noted Plaintiff suffered frequent incontinence and double vision on extreme right lateral gaze. (Tr.150).Dr. Sibley's record also states that at this time Plaintiff was not medically disabled for work, had demonstrated an "above average mental ability," was not on any medications and had not experienced any new attacks of MS within the past two years. (Tr. 150).

Subsequently, in April 1992 Plaintiff was again examined by Dr. MacCollum. At this time Dr. MacCollum noted that Plaintiff's back pain was "completely resolved" and discharged Plaintiff from further care relating to this condition. (Tr. 165). Dr. MacCollum noted, however, that Plaintiff suffered from right elbow pain due to a March 1991 injury. (Tr. 169). In the same month, Dr. Jeffrey L. Cornella, M.D., Plaintiff's gynecologist, examined Plaintiff and prescribed medication for her mild incontinence. (Tr. 191). Later on May 12, 1992, at Plaintiff's request, Dr. Sibley wrote a letter to her employer expressly stating that aside from short periods of exacerbation and a few mild handicaps due to her condition,

Plaintiff "[h]as never been disabled for work." (Tr. 149). On May 15, 1992, Plaintiff was examined by Dr. Villa for stress and anxiety. Dr. Villa found no "clear cut symptoms" and described the exam as "unremarkable." (Tr. 227). Plaintiff subsequently underwent upper GI tests for a possible peptic ulcer disease diagnosis. Plaintiff tested negative for peptic ulcer disease diagnosis (Tr. 227). Plaintiff tested negative for peptic ulcer disease, but was diagnosed with a sliding hiatal hernia. (Tr.235). In August 1992, Dr. Sibley assessed Plaintiff's gait, coordination, sensory examination and mental state as "normal", her reflexes as "active" and stated that Plaintiff was "[a]symtomatic from a neurological standpoint." (Tr. 148). Finally, in November 1992, Plaintiff returned to Dr. MacCollum due to elbow limitations while performing heavier activities. (Tr. 162).Dr.MacCollum diagnosed with a "very mild permanent limitation," but noted Plaintiff was "capable of carrying out lighter type office work which does not involve repetitive lifting of objects greater than 10-15 pounds." (Tr. 162).

Plaintiff's next medical exam occurred in May 1993, when Plaintiff saw Dr. MacCollum for a knee abrasion and elbow pain. (Tr. 161). Dr. MacCollum found that Plaintiff did have tenderness over the medial epicondoyle, but retained and excellent range of motion. (Tr. 161). Additionally, although Plaintiff's elbow had improved since her last visit, Dr. MacCollum ordered some activity restrictions. (Tr. 161).

Later, on February 1, 1994, Dr. Sibley examined Plaintiff after complaints of "zings"in her right arm. (Tr. 147). In response, Dr. Sibley prescribed tegretol

For the the pain. (Tr.147). Dr.Sibley also noted that plaintiff continued to suffer diplopia on extreme right lateral gaze. (Tr. 147). Overall, Dr. Sibley characterized the examination as "virtually normal" and Plaintiff's MS as "static except for recurrent paroxysmal phenomena." (Tr.147).. In the same month, Plaintiff suffered and injury to her left calf by a grocery cart. (Tr.160). Plaintiff's injury healed with minor residual tenderness. (Tr. 158). Plaintiff S last visit with Dr. Sibley appearing in the record was on August 30, 1994. Here, Dr. Sibley stated that Plaintiff's MS was "in remission" and assessed he gait, motor power and rapid succession movements as "normal". (Tr. 146). Dr. Sibley Stated, however, that Plaintiff still experienced such symptoms as occasional "zings" in her right arm, "mild medial rectus weakness on left" and diplopia. (146-148).

In June 1995, Plaintiff was examined by Dr. Richard C. Christensen, M.D. for lower back pain. (Tr. 157). Dr. Christensen diagnosed a lumbar strain, prescribed anti-inflammatory medication and physical therapy. (Tr. 156, 157). In September 1995, Plaintiff underwent her annual examination with Dr.Cornella reported that Plaintiff "has experienced some MS symptoms in the right upper extremity, from her description and has some difficulty bending over." (Tr. 198). Additionally, Dr. Cornella noted that Plaintiff suffered from urinary incontinence. (Tr. 198).

In May 1996, Plaintiff visited Dr. W.C. Brainard, M.D., complaining of back pain, Dr. Brainard diagnosed the pain as a recurrent back strain and prescribed hot packs, anti-inflammatory medication and physical therapy. (Tr.154)., Later in September 1996, Plaintiff returned to Dr. Cornella for her annual

examination. (Tr.199, 217). At this time, Dr. Cornella Observed that Plaintiff was "doing well," had "no particular complaints" and had "done very well in the last year with multiple sclerosis." (Tr. 199). Dr. Cornella also noted that Plaintiff 's urinary incontinence was "stable" and that she "does very well during the day in terms of her incontinence." (Tr. 199). On December 20, 1996, Plaintiff was examined by Dr. Villa for MS and heartburn. (Tr. 219). Dr. Villa documented that Plaintiff's MS "isn't giving her any problems this year." (Tr. 219).

B. Workshop Evaluation

On July 18, 1997, Plaintiff underwent a workshop Evaluation by Richard W. Vandenberg. at the request of the Disability Determination Service Administration. for the State of Arizona. (Tr. 237-246). In his report dated July 25, 1997, Mr. Vandenberg noted that Plaintiff's performance was affected by such factors as uninary incontinence, a "stumbling, weaving, gait," difficulty with reading comprehension, compromised dexterities, problems with communication and progressive fatigue. (Tr. 239). Mr. Vandenberg recorded that plaintiff performed activities requiring hand-eye coordination at a slow pace and could only type 27 words per minute. (Tr. 239). Based upon her performance, Mr. Vandenberg concluded Plaintiff was currently unable to sustain employment. (Tr. 242-243). Additionally, Mr. Vandenberg opined that Plaintiff had not been able to sustain competitive employment since 1959. (Tr. 242, 243)

The ALJ expressly rejected Mr. Vandenberg's opinion regarding Plaintiff's inability to work since 1959. The ALJ reasoned that the vocational

consultant's opinion was based on a one-time evaluation of the claimant and conflicted with the greater weight of the medical evidence, specifically citing the medical records from Dr. Sibley. The ALJ may give great deference to the opinion of a treating physician because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Morgan v. Commissioner of Social security, 169 F. 3d 595, 600 (9th Cir. 1999) (quoting Sprague v. Bowen,* 812 F.2d 1226, 1230 (9th Cir.1987).Thus, because Dr. Sibley had been Plaintiff's treating physician for MS since 1985 and Mr. Vandenberg's opinion was conclusory, rather than based on actual medical evidence of disability in 1959, it was within the discretion of the ALJ to reject Mr. Vandenberg's testimony on this subject.

C. Plaintiff's Testimony

At the January 1999 hearing before the ALJ, Plaintiff testified that she had been unable to work since November 30, 1992 due to her MS. (Tr.30). Prior to this date, Plaintiff confirmed that she worked for Phoenix Union High School District since 1980 and that her earnings her last year of employment, 1992, totaled $17,000. She stated that during the period in controversy her MS exacerbations were manifested as pain in her right arm and diplopia and that she was also on medication for her MS. Additionally, Plaintiff reported during 1992-1996 she had numbness in her fingertips and had difficulty walking and lifting objects, and experienced "zings" down her spine when she would bow. Plaintiff stated that she did not have any trouble sitting during the same period, nor did she have

problems cooking, bathing, dressing, sleeping or completing household chores.

In deciding whether to accept subjective complaints, the ALJ must perform the analysis adopted in *Cotton v. Bowen,* 799 F.2d 1403 (9thCir. 1986), as a threshold matter. *Smolen v. Chater,* 80 F.3d 1273, 1281 (9thCir.1996). If the claimant produces evidence to satisfy the *Cotton* test, the ALJ can reject the claimant's testimony on severity of symptoms only by giving "specific, clear and convincing reasons for doing so." *Id.* Under *Cotton,* the claimant who bases disability on subjective complaints must produce objective medical evidence of an underlying impairment (but not of the pain or fatigue) and must show that the impairment or combination of impairments reasonably could "produce some degree of symptom." *Id.* at 1281-82. The latter prong of the test does not require evidence of a causal relationship between the medically determinable impairment and the alleged symptom or that the impairment could reasonably be expected to produce the severity of symptom alleged. *Id.* at 1282.

If the claimant meets the *Cotton* test, and no evidence shows malingering, in order to reject her testimony regarding the severity of symptoms, the ALJ must specifically state clear and convincing reasons and specify which symptom testimony is not credible and what facts support the conclusion. *Id.* at 1284. In doing so, the ALJ may consider the claimant's reputation for truthfulness or untruthfulness; any prior inconsistent or less than candid statements; unexplained or inadequately explained failure to seek or follow a course of treatment; and claimant's daily activities. *Id.* The ALJ

must also consider the claimant's work record; observations regarding the nature, onset duration and frequency of symptoms by treating and examining physicians; triggering and aggravating factors; and functional restrictions and symptoms. *Id.*

Here, the Plaintiff testified that her MS-related conditions were so severe that she was precluded from working by November 30, 1992. Plaintiff also produced objective medical evidence of her diagnosis of MS, which could reasonably produce such symptoms. Based on the foregoing, Plaintiff satisfied both prongs of the *Cotton* test. Thus to reject Plaintiff's testimony that the exacerbations of MS inhibited her continued employment, the ALJ was required to state clear and convincing reasons supported by specific facts. Reviewing the administrative record, the Court finds the the this requirement. The requirement. The ALJ made express findings that the medical reports of Dr. Sibley, written near the time of plaintiff's termination of employment, rebutted Plaintiffs testimony concerning the severity of her symptoms. Specifically, the ALJ offered a detailed review of the letter Dr. Sibley authored in May 1992 stating that Plaintiff's employer had attempted to terminate her for poor job performance and tried to induce her to take early medical retirement. The ALJ notes, however, that Dr. Sibley clearly stated in the letter that he was convinced Plaintiff was not disabled. The ALJ also cites Dr. Sibley's examination on August 24, 1992, which stated that Plaintiff was "asymptomatic from a neurological standpoint" and exhibited "a normal gait, coordination, and sensory reception." (Tr. 21). Thus, based on this evidence, the ALJ concluded that

plaintiff's cessation of work did not result from MS, but" employment difficulties at a specific job location and it would not necessarily be indicative of the claimant's ability to perform the same type of job at another location." (Tr. 21). The ALJ therefore supplied clear and convincing evidence supporting his decision to disregard Plaintiff's testimony.

D. Testimony of the Vocational Expert

Additionally, Mark Kelman, a vocational expert, testified at the hearing that Plaintiff's former position as a clerk-typist was semi-skilled and of a sedentary exertional level. Subsequently, the ALJ proposed several hypotheticals describing an individual with conditions similar to those of Plaintiff, but in varying degrees. The ALJ relied on Mr. Kelman's opinion that exacerbations in Plaintiff's MS would cause her to occasionally miss work, but would not preclude her from performing her past work as a clerk typist. (Tr. 49). Mr.Kelman also stated, however, that an individual with conditions consistent with those testified to by Plaintiff would not be able to perform her past relevant work as a clerk-typist, testimony which the ALJ rejected. (Tr. 55).

E. The ALJ's Decision

The ALJ issued a decision affirming the December 1, 1996 disability onset date. The ALJ found from the entire record that (1) Plaintiff met the disability insured status requirements of the Act on November 30, 1992 and continued to meet them through December 31, 1997; (2) that Plaintiff had not engaged in "substantial gainful activity" since November 30, 1992; (3) medical evidence established severe MS,

but not an impairment or combination of impairments listed or medically equal to one listed in the Regulations; (4) Plaintiff's allegations of a disabling condition prior to December 1, 1996 were not supported by the greater weight the medical evidence; (5) Plaintiff has the residual functional capacity to perform work related activities except for work involving activities that exceed a sedentary exertional level; (6) Plaintiff's past relevant work as a clerk typist did not require the performance of work related activities precluded by such limitation(s); (7) Plaintiff's impairment did not prevent her from performing her past relevant work prior to December 1, 1996; and (8) Plaintiff was not under a "disability" as defined in the SSA, at any time through the date of the decision. (Tr. 23). Not withstanding the finding that plaintiff was not under a disability through the date of his decision, the ALJ nevertheless sustained the December 1, 1996, disability onset date. Although the ALJ's findings deem inconsistent this Court has not been called upon to determine whether Plaintiff was disabled at the time of the administrative hearing in January 1999. Thus, this Court's inquiry is limited to whether Plaintiff was disabled prior to December 1, 1996.

IV. Discussion

A. Disability Onset Date

The central issue before this Court is whether the December 1, 1996, disability onset date is supported by substantial evidence. As articulated above, the Court's focus is limited to whether the onset date actually chosen is supported by substantial evidence and not whether an earlier date could nave been

supported. *Villa v. Heckler,* aat 797. Accordingly reviewing the record in toto, the Court finds that there is substantial evidence to sustain the December 1, 1996 as the onset date of plaintiff's disability.

First, surveying Plaintiff's medical records from 1992 to 1997, there is no indication that any physical or mental impairment rendered Plaintiff disabled. Throughout this period, Plaintiff sought the treatment of multiple physicians specializing in various fields of medicine, including neurology, gynecology and orthopedic medicine. Yet, while the records clearly demonstrate that Plaintiff suffered from consistent physical ailments, both related and unrelated to MS, plaintiff's condition was never diagnosed as disabling. Particularly, in 992, the year Plaintiff alleges disability, Dr. Sibley explicitly stated that despite minor handicaps, Plaintiff was not disabled nor unable to sustain full-time employment. Likewise, The exam reports of Plaintiff's primary care physician and gynecologist, Dr. Villa and Dr. Cornella, respectively, buttress this favorable characterization of Plaintiff's annual examination in 1996, Dr. Cornella recorded that Plaintiff "had no particular complaints" and was doing "very well" with her MS. Similarly, as late as December 1996, Dr. Villa noted that Plaintiff's MS had not been a problem during the preceding year. Altogether, the medical records are devoid of evidence indicating that Plaintiff's MS had reached a disabling level.

To be sure, the records clearly demonstrate that Plaintiff did suffer from recurrent medical problems during this period. Specifically, it is well documented that Plaintiff suffered from MS-related conditions such as "zings" of pain in her right arm, urinary

incontinence, and double vision, as well as non-MS related problems, such as anxiety attacks, back strains and elbow injuries. These conditions, however, were not permanent nor at a level of severity rendering Plaintiff disabled under Social Security regulations. Thus, the medical evidence compels the Court to conclude that Plaintiff was not Disabled prior to 1996.

The first indication in the record of an onset of disability from MS is found in the workshop evaluation administered in July 1997 by Mr. Vandenberg. After an extensive battery of cognitive and skill tests. Mr. Vandenberg concluded that Plaintiff's impaired motor and communication abilities, coupled with fatigue and incontinence, precluded her from engaging in gainful employment at this time. (Tr. 242). This evaluation provides the first clear evidence that Plaintiff's MS had exacerbated to a disabling level. Thus the medical records and vocational evaluation narrow the period during which disability occurred considerably, namely between December 1996 and July 1997. Based on the July 1997 report, the Commissioner adjudged Plaintiff disabled and retroactively set the onset date of disability at December 1, 1996 to account for the severity of Plaintiff's symptoms. This date was subsequently affirmed by the ALJ. After an appraisal of the entire record, this Court finds that the medical evidence and 1997 vocational report reasonably lead to the selection of December 1, 1966, as the disability onset date. As stated above, the onset date must be supported by substantial evidence, which is more than a scintilla but less than a preponderance of the evidence. Applying this standard and reviewing the Record as

a whole, the Court find that the ALJ's selection of December 1, 1966, as the onset date for Plaintiff's disability was based on substantial evidence and will therefore be sustained by this Court.

B. Plaintiff's Other Objections

In her motion for Summary Judgment, Plaintiff also raises a series of objections to the Commissioner's position, as set forth in the ALJ's report. Plaintiff first objects to the ALJ's Stage Three findings that the Plaintiff did not have an impairment equal to one that the Commissioner acknowledges as so severe as to automatically preclude Plaintiff from engaging in substantial gainful activity. In her response brief, Plaintiff specifically argues that she was conclusively disabled under 20 a C.F.R. Sec 404.1520 (d) and listing 1109(c) of Appendix 1 of the regulations.(Doc. #22, 5-6).

Section 404. 1520(d) provides that an individual with an impairment that "meets or equals a listed impairment in Appendix 1" is disabled. Listing 11.09 of Appendix 1 covers "Multiple Sclerosis."Under listing ll.09(c), MS constitutes an automatic disability If it is accompanied with "[s]ignificant,reproducible Fatigue of motor function with substantial muscle weakness on repetitive activity, demonstrated on physical examination, resulting from neurological dysfunction in areas of the central nervous system known to be pathologically involved by the multiple Sclerosis process."

Examining the record, the Social Security Administration found Plaintiff disabled under the criteria set forth in listing ll.09(a),MS qualifies as disabling when it includes "[d]isorganization of motor

function as described in 11.04B." After concluding that Plaintiff qualified as disabled under 11.09(a), the Commissioner provided an allowance of seven months to account for the severity of Plaintiff's symptoms, effectively setting the onset date at December 1, 1966. Thus even if the Commissioner would have found Plaintiff disabled under Listing 11.09(c), because this determination would be founded on the same piece of evidence, the disability onset date would not be affected. Plaintiff's argument therefore does not undermine the current disability onset date of December 1, 1966.

Plaintiff also argues that the ALJ's decision was erroneous because the judge failed to consider her letter dated August 20, 1999. The ALJ's decision issued April 29, 1999, however, predated the Plaintiff's letter by four months. Thus the ALJ could not have considered Plaintiff's statements in the August 20th correspondence.

Next, Plaintiff disputes the ALJ's determination that she retained residual functional capacity to perform work a sedentary exertional level pursuant To 20 C.F.R.404.1545. Specifically, Plaintiff argues that her "sensory requirements were put to the test" after a photocopying machine was installed in her office. (Doc.#21,6). Plaintiff alleges that the speed, noise and heat of the copier aggravated her MS and Made it impossible to carry out job duties, including manning telephone calls and providing assistance to others. (Doc. #21,7). Section 404.1545 provides the

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1 The AlJ, however, found that Plaintiff retained residual functional capacity to engage in sedentary work and was therefore not disabled

through the date of the decision. Despite this conclusion, the ALJ sustained the disability onset date established by SSA.

Criteria for assessing a claimant's residual funtiional Capacity. Residual functional capacity is defined as the activities a claimant can still perform despite her Limitations. At the administrative hearing, Mr. Kelman testified that despite Plaintiff's occasional unsteady gait, exacerbations of MS in her right arm, Incontinence and occasional absenteeism due to such conditions, she would still be able to engage in her past work. (TR. 49-50). In addition, Mr. Kelman stated that despite Plaintiff's inability to work in close proximity to heat-producing office equipment, there would still be thousands of secretarial-type jobs within Arizona where Plaintiff could be employed. (Tr. 51-52). Thus based on the vocation Expert's opinion, the AlJ reasonably concluded that Plaintiff retained the residual functional capacity to perform her past work prior to December 1, 1996.

Finally, Plaintiff objects to the ALJ's classification of her occupation as that of a "clerk-typist." Instead, Plaintiff asserts that based on the duties she performed, the proper classification should have been that of "administrative assistant." The record indicates that Mr.Kelman classified Plaintiff's former occupation after a thorough review of Plaintiff's vocational history. Mr. Kelman determined that Plaintiff performed clerical work in various secretarial capacities, including positions titled secretary I, secretary II and clerk/typist. Despite the differing job titles, Mr. Kelman stated that the Department of

Labor classifies both the secretary position and the position as clerk typist as sedentary in exerational demand. In his findings, the ALJ concluded that Plaintiff retained residual functional capacity to perform work related activities up to December, l, 1996, provided that such activities do not exceed a Sedentary exertional level. (Tr. 23). Thus the ALJ's Decision would not be altered had Plaintiff' been classified as a secretary; rather than a clerk typist.

V. **Conclusion**

Because the findings of the administrative law judge are supported by substantial evidence, the decision of the administrative law judge will be affirmed. Accordingly,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment (Doc. #21) is denied;

IT IS FURTHER ORDERED that Defendant;s Cross-Motion for Summary Judgment (Doc. #39) is granted.

DATED this 30 day of November, 2001

"s/_____".
James A. Teilborg
United States District Judge

APPENDIX C

20 C.F.R. , Subpart P of Part 404-Appendix 1 Listing 0f Impairments
Neurological (11..00)

C. Persistent disorganization of motor function in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances (any or all of which may be due to cerebral cerbellar, brain stem, spinal cord, or peripheral nerve dysfunction which occur singly or in various combination, frequently provides the sole or partial basis for decision in case of neurological impairment. The assessment of impairment depends on the degree of interference with locomotion and/or interference with the use of fingers, hands, and arms

D. *In conditions which are episodic in character,* such as multiple sclerosis or myasthenia gravis consideration should be given to frequency and duration of exacerbations, length of remissions, and permanent residuals.

E. *Multiple sclerosis*, The major criteria for evaluating impairment caused by multiple sclerosis are discussed in listing 11.09. Paragraph A provides criteria for evaluating disorganization of motor function and gives reference to 11.04B (1104B then refers to 11.0C). Paragraph B provides references to other listings for evaluating visual or mental impairments caused by multiple sclerosis. Paragraph C provides criteria for evaluating activity as a result of fatigue.
Use of criteria 1in 11.09C is dependent upon (1)

documenting a diagnosis of multiple sclerosis, (2) obtaining a description of fatigue considered to be characteristic of multiple sclerosis, and (3) obtaining evidence that the system has actually become fatigued. The evaluation of the magnitude of the impairment must consider the degree of exercise and the severity of the resulting muscle weakness. The criteria in 11.09C deals with motor abnormalities which occur on activity. If the disorganization of motor function is present at rest, paragraph A must be used, taking into account any further increase in muscle weakness r2esting from activity. The Sensory abnormalities may occur. particularly involving central visual acuity. The decrease in visual acuity may occur after brief attempts at decrease in visual acuity may occur after brief attempts at activity involving near vision such as reading. This decrease in visual acuity may not with rest, but is predictably reproduced with resumption of the activity. The impairment of central visual acuity in these cases should be evaluated under the criteria in listing 2.0 taking into account the fact that the decrease in visual acuity will wax and wane. Clarification of the evidence regarding central nervous system dysfunction responsible for the symptoms may require supporting technical evidence of functional impairment such as evoked response tests during exercise.

11.01 Category of impairments,
Neurological...

11.09 *Multiple sclerosis.* With:

A. Disorganization of Motor function as described in 11.04B; or (11.09 B. cont'd below)

11.04 B. Significant and persistent disorganization of

motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C).

11.00

C. Persistent disorganization of motor function in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances (any or all of which may be due to cerebral cerebellar, brain stem, spinal cord, or peripheral nerve dysfunction) which occur singly or in various combination, frequently provides the sole or partial basis for decision in cases of neurological impairment. The assessment of impairment depends on the degree of interference with locomotion and/or interference with the use of fingers. Hands, and arms.

11.09 (B) (cont'd)

B. Visual or mental impairment as described under the criteria in 2.02, 2.03, 2.04, or 12.02; or

C. Significant, reproducible fatigue or motor function with substantial muscle weakness on 3repetitive activity, demonstrated on physical examination resulting from neurological dysfunction in areas of the central nervous system known to be pathologically involved by the multiple sclerosis process.

In *Parish v. Califano* F 2d 188-193 (6th Cir. 1981) Honorable Judge Cornelia Kennedy very clearly ruled on how a claimant such as Patricia Parish could be grossly misdiagnosed with the mysteries of the Multiple Sclerosis Syndrome by the legal, medical, employment, and personal. Such has happened to me.

In accord with Rule Number 10,Supreme Court of The United States The United States Court Of Appeals For The Ninth Circuit has entered a decision in conflict with a decision with The United States Court of Appeals for the 6th Circuit Of Appeals, I too was misunderstood with the same medical pattern as with Patricia Parish.in that important question(s) beg a decision from this Court. The ALJ in my case was similar to Parish refusing and rejecting Subpart P, as produced in Appendix C. The ALJ and the Commissioner and her legal staff refuse to recognize what Judge Cornelia Kennedy ruled about multiple sclerosis patients. If it so please this honorable court to not allow a "legal" description and other medical terms and cases which are not relevant to the multiple sclerosis syndrome.. Even the medical field cannot understand multiple sclerosis and have a definitive explanation to explain multiple sclerosis impairments. Therefore neurological diagnoses already codified by the SSA, should be at least the basis for determining multiple sclerosis disability recipients, not rules and procedures used for curable medical modalities. As depicted above-I have completely produced in it s entirety in APPENDIX C for ease of your perusal.

If it please the Court I would like to enter some additional data already found in the record but not

clarified verbatim. Please help by listening to the outright terrorizing experience I underwent working for the school district and trying to educate those who are ignorant of this mystery disease.

. The employer is not a "social worker" they require performance-multiple sclerosis cannot have a time stamp placed on consistent performance edicts. Judge Kennedy depicted what the AlJ not only erred in Parish but, also the ALJ in my case approached my case like a claimant who has a "curable" disease. *Parish v. Califano* F .2d 19[illegible] (6th Cir. 1981.);

...*In conditions which are episodic in character,* such as multiple sclerosis. or myasthenia gravis consideration should be given to frequency and duration of exacerbations, length of remissions and permanent residuals...

In accord with Rule 14(g) (i) (vi) other materiel I believe essential to understand the total facts in the hearing follows.

On my hearing of January 8, 1999, the ALJ reported only one instance of my being able to return to my previous employment per vocational expert Mark Kellman: (TR. 1/9/99)

*Hypothetical #1 VE-<u>Could not</u> return to work (TR.47,48)

*Hypothetical #2 VE-Could return to work (TR. 48, 49,

*Hypothetical #3 VE-<u>Could not</u> return to work (TR. 50)

Hypothetical question # 2 was not all inclusive of my ability to return to work.
Final Question on whether I was able to return to my former employment-the truth: (Tr. 55.,56):

CLMT: My doctor wouldn't hire me he said because, "I expect you to work eight hours period." Eight hours.

ALJ: So -- well let him (Mark Kellman Voc. Ex.) answer the question that --

CLMT: So what's the question

ALJ: -- I think it was a good question that you tried to -- I tried to rephrase for you which I thought was a good question. I, I, I would have let him answer it. Based on the way the claimant testified today of her limitations with regard to her abilities to perform daily activities and her- - and what she was able to do as to activities such as sit stand, walk, and bend, stoop etc. Would such an -- would an individual such as the claimant be able to perform her past relevant work from what you've heard today?

VE: No

ALJ: Okay. I think that's the question you wanted to ask.

CLMT: You answered it . Yes I think that's what it was.

ALJ: Okay Is there anything else? Don't worry about the water.

CLMT: Well, it's coming on to my paper.

ALJ: Oh, okay.

CLMT: I worry about that.

ALJ: Anything else?

CLMT: I think we've pretty well covered it.

ALJ: Okay Why don't you -- okay. I think you -- okay. Anything else you want to tell me that you haven't covered so far? I think I understand your

Situation.

CLMT: I think, I think we understand the situation. All of us... (END OF HEARING)

Three out of four "NO's are not a preponderance of evidence that I could return to my former employment for "four years"(December 1992 thru December 1996.) At the conclusion of the hearing I was able to ask the right question that was directly related to my work responsibilities: We all agreed I could not return to my former employment!

In January of 1991 the school principal "terrorized" me with incessantly saying he was going to "terminate me." These verbal threats and being demoted and changed in employment from a secretary II to "clerk typist." In hearing with the ALJ the vocational expert stated that I was a clerk typ[ist in "87-88" (TR 46,47) I was demoted and placed from a 10 month contract to a 12 month contract with less income That was a demotion.

These medical facts are quoted verbatim from PLAINTIFF'S REPLY MEMORANDUM TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT: (P. 2 L 31-35):

"I too was in an exacerbation prior to 1-30-90 (TR 150) and I was in remission from 1-30-90 ("no MS attacks in past 2 years") Dr. Sibley present session 3/30/92..."while she has some medical handicaps from MS:; frequent incontinence making it necessary for her to wear adult diapers, and mild left medial rectus weakness with tendency to double vision extreme right lateral gaze...she needs help from her (P. 3L. 1-4

union and possibly an attorney to investigate whether she is being discriminated against because of her age (57) and medical handicaps...I too wanted to work like Parish and Wilcox. Also my multiple sclerosis was progressively worsening because of the Phoenix Union High School System aggravating my medical condition...

(L 16-25)

..."In November 30, 1992 the Phoenix Union High School Board terminated me. I was threatened with termination in January of 1991 by the principal. In March 22, 1991 after I tripped over a telephone in the admissions office, and broke my right elbow (my MS chronic sharp pains elbow., (Industrial Cl Nr. 92-0357, State Compensation Fund.) On 1-10-92 I injured my cback trying to move some files into a cabinet (Industrial cl Nr. 92-03509 State Compensation Fund), I still tried to work. Tr. 165 Dr. Mac Collum III MD. Orthopaedic Surgeon 4-1-92 ...Ms. Robinson is having persistent problems about the elbow in two areas she is still having her medial epicondylar pain but now is having more pain over the flexor wad and anterior radiual humneral joint...Ms. Robinson is having persistent problems which-

(P, 3. L. 1-4)

union and possibly an attorney to investigate whether she is being discriminated against because of her age (57) and medical handicaps,,,I too wanted to work like Parish and Wilcox. Also my multiple sclerosis was progressively worsening because of the Phoenix Union High School System aggravating my medical condition...

I followed their advice and did seek and paid for legal council from an attorney, but, was to no avail.

With over 250 charges against me I had no choice but to retire early and as always with multiple sclerosis with greatly reduced benefits. My whole termination was sealed and not to be discussed or to be opened-per school district's counsel.

During my attempts to work as efficiently as possible, I sought the support of Dr. Sibley on my limited career, especially when the principal would constantly threaten me with "termination ." As the victim of a progressive debilitating disease that was very depressing his abject behavior to my person. Of my medical reports from November 1992 thru December of 1996 of course would improve- I was unable to work and did not work, gone were the irritants of work that were aggravating my medical condition-I remained in my home and still required medical care and assistance-again I was not cured of multiple sclerosis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Elaine Ruth Robinson

Elaine Ruth Robinson, pro se

Date: June 3, 2023

Supreme Court, U.S.
FILED
OCT 31 2003
OFFICE OF THE CLERK

No. 02-1786

In The

SUPREME COURT OF THE UNITED STATES

ELAINE RUTH ROBINSON

Petitioner

v,

JO ANNE B.BARNHART-RESPONDENT
Commissioner, Social Security Administration

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

PETITION FOR REHEARING

ELAINE RUTH ROBINSON
PRO SE
6540 West Highland Avenue
Phoenix, AZ 85033-1615

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I. The Court should consider and grant this petition for Rehearing because this Petition puts forth a "substantial ground not previously presented" in the Petition for Certiorari, to wit, (1) the record discloses that the conduct of the SSA , Commissioner, ALJ and State Disability Examiner constitutes *criminal conduct* within the meaning of 18 U.S.C.Sec 2071; and (2) this fact properly should be considered in this Courts determination of whether Commissioner (s), ALJ and State Disability Examiner's conduct was "conscience shocking"in the constitutional sense and thereby a violation of substantive due process. . . . 1

II. The Court should consider and grant this Petition for Rehearing because the the July 2002 decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v, TDC Management Corp.*, 288 F. 3d 421 (D.C. Cir. 2002), constitutes an "intervening circumstance [] of... substantial effect." in that the Circuit Court of Appeals in that decision underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction. 4

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Reasons For Granting The Petition For Rehearing

I. The Court consider and grant this petition for Rehearing because this Petition puts forth a "substantial ground not previously presented

"In the Petition for Certiorari, to wit, (1) the record discloses that the conduct of the Commissioner, ALJ and State Disability Examiner constitutes criminal conduct within the meaning of 18 U.S.C.Sec 2071; and (2) this fact properly should be considered in this Courts determination of whether ombudsman conduct was "conscience shocking " in the constitutional sense and thereby a violation of substantive due process.

One permissible ground for a petition for rehearing of an order denying a petition for certiorari is a "substantial ground not previously presented." Supreme Ct. Rule 44(2). As will be fully set forth below, a substantial ground not presented in the Petition for Certiorari is presented herein, and provides further and compelling ground for this Court to grant the writ of certiorari in this case. To the foregoing list we add, in this Petition for Rehearing, the further point that the record discloses Terri B. Lopez, Disability Examiner Arizona Department of Economic Security Disability Determination Service Administration and under contract with the Social Security Administration Did willfully remove conceal and obliterate the complete medical issue's report (TR.241,242,243) by not crediting authorship to Dr. Ann Hirschhorn.in her Case Development Sheet (TR. 100) Dr. Hirschhorn directed the specificity for "specific evaluation questions" (TR. 237,241,242,243) and her issues for medical evidence for Mr. Vandenbergs' three page report of my grueling 7 1/2hours test for multiple Sclerosis impairments.

It was further asserted that this undisputed seven and one half hour of multiple Sclerosis grueling tests medical facts were overlooked by the courts below and taken together, are so manifestly arbitrary and conscience shocking as to give rise to a violation of substantive due process and as to warrant this Court's intervention.

18 U.S.C. Sec 2071 provides:

> Concealment, removal, or mutilation generally
> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with ... any public office, or with any ...public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.
> (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

Note that 18 U.S.C. Sec 2071(b) applies specifically to one who has "custody"[1] of a federal

1. The term "custody" as used in 18 U.S.C. Sec 2071(b) applies to any federal employee who has "access to and control over" the federal records. *See United States v, Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989)(holding that statutory term "custody" is not limited to "only those who are custodians of [federal] records in the technical sense, The term "custody as *used* in 18 U.S.C. Sec 2071(b) applies to any federal employee who has "access to and control over" the federal records. *See Coplon v, United States*, 191 F.2d 749 (D. C. Circa 1951).

record meaning that Congress specifically intended that the criminal statue apply to federal employees, such as disability examiner, ALJ, Regional SSA Commissioner who intentionally destroy or willfully and unlawfully conceals or obliterates federal records when such records such as Dr. Hirschhorns are in their possession and control. The ALJ (in his hearing of January 8, 1999) nor did the SSA provide me with the report of Dr. Hirschhorn until February 27, 2001(two years after the hearing) when The United States Court OF Appeals For The Ninth District, Wherein APPELLEE DEFENDANT'S SUPPLEMENTAL EXCERPT OF RECORD, was mailed to me by US Mail after the fact. This conduct is conscience-shocking in the constitutional sense, and thereby a violation of my substantive due process

Note further that criminal sanctions for violation of 18 U.S.C. Sec 2071 (b) expressly include ---in addition to imprisonment of up to three years or fine of both --- forfeiture of federal office, meaning that Congress contemplated that the offense of destruction of federal records would apply, with special force, to federal employees...

Here, the record shows that the ALJ either in the hearing or in his findings did he include Dr. Ann Hirschorn's specific issues which were the basis for meeting just minimum medical impairments.

With this as background, we turn to this Court's substantive due process doctrine and the "guideposts", *Collins v, City of Harker Heights,* 503 U.S. 115 128 (1992), used by the Court to identify government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense". *id.* This Court has recognized "time and

of the individual against arbitrary action of government. *County of Sacramento v, Lewis,* 523 U.S. 833, 845 (1998) (internal quotations omitted). Then too, the Court has cautioned that whether a government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense,"

II. The court should consider and grant this Petition for Rehearing because the July 2002 decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v, TDC Management Corp.,* 288 F.3d 421 (D.C. Cir 2002), constitutes an "intervening circumstance[]of ...substantial effect," in that the Circuit Court of Appeals in that decision underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction.

One permissible ground for a petition for rehearing of an order denying a petition for certiorari is an "intervening circumstance [] of substantial effect." Supreme Ct. Rule 44(2).

As will set forth below, the July 2002 decision of the United States Court of Appeals for the District of Circuit in *United States v, TDC Management Corp.,* 288 F.3d 42 (D.C. Cir. 2002), constitutes an "intervening circumstance[] of ...substantial effect"

In *TDC management,* the Government brought an action against TDC Management Corporation ("T DC") alleging misrepresentation of material information in a service contract with the government. *Id* at 422. TDC's obligations under the service contract included serving as a Program Ombudsman in connection in connection with certain

minorities business enterprises that were doing business with, or seeking to do business with, the Government. Id. at 423. As Program Ombudsman, TDC was precluded from having any financial interest in any of the operations of the Program. *Id.* TDC, however, purchased an interest in the Program's operations and failed to disclose this interest to the Government. *Id.* 424. On this record, TDC argued before the Circuit Court that its role as Program Ombudsman, and that, accordingly, TDC was entitled to compensation under its contract with the Government, *Id.* at 427-28. The Circuit Court soundly rejected this argument, finding that TDC's financial stake in the Program and its role as Program Ombudsman were inconsistent. The Circuit Court held:

> Once TDC deviated from its contracted role as impartial ombudsman by seeking a financial stake in joint ventures with private investors and by charging fees for the provision of material assistance to minority entrepreneurs, the district court could properly find that the program, no longer had any value to the government.

(*Id,* at 429).

Thus, the Circuit Court in *TDC Management* underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction. The Circuit Court went so far as to hold that a federal ombudsman who compromises these standards is of "[no] value to the government." *Id.*

The Circuit Court's July 2002 decision in TDC Management provides additional substantial authority in support of the contentions put forth in our Petition for Certiorari that (1) the ombudsman model has assumed ever-increasing importance in the Executive Branch as an

Certiorari that (l) the ombudsman model has assumed ever-increasing importance in the Executive Branch as an alter alternative means of resolving federal administrative disputes; (2) this trend has important constitutional consequences, pertaining to matters of fairness and impartiality in the resolution of federal administrative disputes; and (3) in light of the foregoing, the constitutional issue here presented of a procedural due process right to fair and impartial federal agency ombudsman is an important question of federal law that has not been but should be settled by this court. *See Supreme* Ct. Rule 10(c). Because, the Circuit Court's decision in TDC Management underscores the critical importance and expectation that a federal ombudsman be impartial as to matters within his or her jurisdiction, this Court should consider and grant this petition.

CONCLUSION

The petition for rehearing should be granted.

Reasons For Granting The Petition For Rehearing

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Note that 18 U.S.C. Sec 2071(b) applies specifically to one who has "custody"[1] of a federal

1. The term "custody" as used in 18 U.S.C. Sec 2071(b) applies to any federal employee who has "access to and control over" the federal records. *See United States v, Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989)(holding that statutory term "custody" is not limited to "only those who are custodians of [federal] records in the technical sense, The term "custody as used in 18 U.S.C. Sec 2071(b) applies to any federal employee who has "access to and control over" the federal records. *See Coplon v, United States*, 191 F.2d 749 (D. C. Circa 1951).

record meaning that Congress specifically intended that the criminal statue apply to federal employees, such as disability examiner, ALJ, Regional SSA Commissioner who intentionally destroy or willfully and unlawfully conceals or obliterates federal records when such records such as Dr. Hirschhorns are in their possession and control. The ALJ (in his hearing of January 8, 1999) nor did the SSA provide me with the report of Dr. Hirschhorn until February 27, 2001(two years after the hearing) when The United States Court OF Appeals For The Ninth District, Wherein APPELLEE DEFENDANT'S SUPPLEMENTAL EXCERPT OF RECORD, was mailed to me by US Mail after the fact. This conduct is conscience-shocking in the constitutional sense, and thereby a violation of my substantive due process

Note further that criminal sanctions for violation of 18 U.S.C. Sec 2071 (b) expressly include ---in addition to imprisonment of up to three years or fine of both --- forfeiture of federal office, meaning that Congress contemplated that the offense of destruction of federal records would apply, with special force, to federal employees...

Here, the record shows that the ALJ either in the hearing or in his findings did he include Dr. Ann Hirschorn's specific issues which were the basis for meeting just minimum medical impairments.

With this as background, we turn to this Court's substantive due process doctrine and the "guideposts", *Collins v, City of Harker Heights,* 503 U.S. 115 128 (1992), used by the Court to identify government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense". *id.* This Court has recognized "time and

of the individual against arbitrary action of government. *County of Sacramento v, Lewis*, 523 U.S. 833, 845 (1998) (internal quotations omitted). Then too, the Court has cautioned that whether a government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense,"

II. The court should consider and grant this Petition for Rehearing because the July 2002 decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v, TDC Management Corp.*, 288 F.3d 421 (D.C. Cir 2002), constitutes an "intervening circumstance[]of ...substantial effect," in that the Circuit Court of Appeals in that decision underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction.

One permissible ground for a petition for rehearing of an order denying a petition for certiorari is an "intervening circumstance [] of substantial effect." Supreme Ct. Rule 44(2).

As will set forth below, the July 2002 decision of the United States Court of Appeals for the District of Circuit in *United States v, TDC Management Corp.*, 288 F.3d 42 (D.C. Cir. 2002), constitutes an "intervening circumstance[] of ...substantial effect"

In *TDC management*, the Government brought an action against TDC Management Corporation ("T DC") alleging misrepresentation of material information in a service contract with the government. *Id* at 422. TDC's obligations under the service contract included serving as a Program Ombudsman in connection in connection with certain

minorities business enterprises that were doing business with, or seeking to do business with, the Government. Id. at 423. As Program Ombudsman, TDC was precluded from having any financial interest in any of the operations of the Program. *Id.* TDC, however, purchased an interest in the Program's operations and failed to disclose this interest to the Government. *Id.* 424. On this record, TDC argued before the Circuit Court that its role as Program Ombudsman, and that, accordingly, TDC was entitled to compensation under its contract with the Government, *Id.* at 427-28. The Circuit Court soundly rejected this argument, finding that TDC's financial stake in the Program and its role as Program Ombudsman were inconsistent. The Circuit Court held:

> Once TDC deviated from its contracted role as impartial ombudsman by seeking a financial stake in joint ventures with private investors and by charging fees for the provision of material assistance to minority entrepreneurs, the district court could properly find that the program, no longer had any value to the government.

(*Id,* at 429).

Thus, the Circuit Court in *TDC Management* underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction. The Circuit Court went so far as to hold that a federal ombudsman who compromises these standards is of "[no] value to the government." *Id.*

The Circuit Court's July 2002 decision in TDC Management provides additional substantial authority in support of the contentions put forth in our Petition for Certiorari that (1) the ombudsman model has assumed ever-increasing importance in the Executive Branch as an

Certiorari that (l) the ombudsman model has assumed ever-increasing importance in the Executive Branch as an alter alternative means of resolving federal administrative disputes; (2) this trend has important constitutional consequences, pertaining to matters of fairness and impartiality in the resolution of federal administrative disputes; and (3) in light of the foregoing, the constitutional issue here presented of a procedural due process right to fair and impartial federal agency ombudsman is an important question of federal law that has not been but should be settled by this court. *See Supreme* Ct. Rule 10(c). Because, the Circuit Court's decision in TDC Management underscores the critical importance and expectation that a federal ombudsman be impartial as to matters within his or her jurisdiction, this Court should consider and grant this petition.

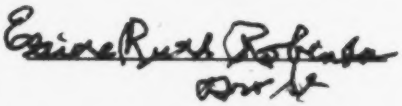
CONCLUSION

The petition for rehearing should be granted.

RULE 44.2
CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening Circumstances of a substantial or controlling effect or to other substantial grounds not previously presented and that it is presented in good faith and not for delay.

Elaine Ruth Robinson



Date: October 31, 2003